STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	No. 312590 Kent Circuit Court
DUANE CRAIG, Defendant-Appellant.	LC No. 12-001108-FH

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant appeals as of right. We affirm.

Defendant was living with his cousin, the victim's mother, and her nine-year-old daughter, the victim. On the night in question, Blaine Beemon, a friend of the victim's mother, observed defendant grope the victim's vaginal area. Blaine informed the victim's mother about defendant's actions. The victim also told her mother that defendant touched her inappropriately. An altercation subsequently occurred that resulted in defendant's ejection from the home. Defendant called the police.

At a later police interview, the victim told Detective Kelli Braate that defendant had squeezed her vaginal area with his hand.

At trial, the victim's mother testified that she never really believed that the victim was telling the truth. By that point, the victim's mother and Blaine had become estranged and according to the victim's mother, the victim had previously stated that Blaine told her to lie when the police arrived so the victim's mother, who was on probation, would not be arrested for being present where a fight had occurred.

Defendant argues that defense counsel was ineffective for failing to object to the trial court's coercive deadlocked jury instruction. In order to prove ineffective assistance of counsel, "defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). "The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

Any jury instruction that substantially departs from CJI2d 3.12 in the case of a deadlocked jury is grounds for reversal. *People v Pollick*, 448 Mich 376, 382; 531 NW2d 159 (1995). An instruction that substantially departs from the proper instruction must "have an undue tendency of coercion – e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement?" *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984). After approximately five hours of deliberation, the jury indicated to the trial court that it was deadlocked. The trial court provided a deadlocked jury instruction, the first part of which was almost identical to CJI2d 3.12. However, the trial court added the following statement:

> Now, ultimately if you can't come to a decision on the matter, we will have to declare a mistrial and retry the case at a later date with another jury. And the problem with that is, of course, that the next group of 12 citizens probably won't be any smarter or more gifted than the 12 people we have assembled here, and they'll have to grapple with the same facts and evidence that you're grappling with now. It will simply require the consumption of more time and expense to achieve that result. So obviously we would appreciate it if you could possibly come to grips with the matter and resolve it through a verdict if you can do so consistent with the rules that I have just explained and without doing violation to your own conscience.

Defendant alleges that this instruction indicated to the jury that a failure to reach a verdict would amount to a failure of purpose and civic duty, which is grounds for reversal pursuant to *Hardin*, 421 Mich at 316. We disagree. Our Supreme Court has indicated that mentioning a retrial, and the costs associated with it, does not amount to a coercive instruction under the standard in *Hardin*. *People v Rouse*, 477 Mich 1063; 728 NW2d 457 (2007) (reversing a decision by this Court holding that discussing a retrial during a deadlocked jury instruction was unduly coercive). We now hold the same – that the trial court's deadlocked jury instruction did not substantially depart from CJI2d 3.12 such that it was unduly coercive. As such, any objection by defense counsel to the trial court's instruction would have been meritless, and defense counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness, and therefore, did not amount to ineffective assistance of counsel. *Frazier*, 478 Mich at 243.

Defendant also argues on appeal that the trial court erred when it instructed the jury that it could consider the victim's out-of-court prior inconsistent statements as substantive evidence of

defendant's guilt. Defendant, however, never asked the trial court for a limiting instruction regarding how to consider the prior consistent statements. Moreover, after the trial court had read the final jury instructions, defense counsel indicated that he was "very satisfied" with the instructions. "Counsel's affirmative expression of satisfaction with the trial court's jury instruction waive[s] any error." *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal quotations and citations omitted). Therefore, because any alleged instructional error related to the jury instruction was extinguished by defense counsel's affirmative approval of the instruction, defendant has no grounds for appeal on this claim. *Id.*

Defendant further argues, however, that defense counsel was ineffective for failing to object to the trial court's instruction to the jury that it could consider the victim's prior inconsistent statements as substantive evidence of defendant's guilt. Thus, we must consider the underlying instructional issue. The general rule is that "prior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). "Extrinsic evidence of a prior inconsistent statement can be used to impeach but it cannot be used to prove the truth of the matter asserted, unless, of course, it falls within a hearsay exception." *People v Jenkins*, 450 Mich 249, 273; 537 NW2d 828 (1995).

Defendant concedes that testimony from the victim's mother and Detective Braate regarding the victim's prior inconsistent statements was admissible as impeachment evidence pursuant to MRE 613(b). However, defendant argues that defense counsel should have objected to the trial court's instruction given pursuant to CJI2d 4.5(2),[1] which is properly used when prior inconsistent statements are admissible both substantively and as impeachment evidence. Pursuant to *Jenkins*, 450 Mich at 273, the victim's statements must fall under a hearsay exception in order to be admissible as substantive evidence. The victim's statement to her mother was admissible under the excited utterance exception provided by MRE 803(2). MRE 803(2) states: "[a] statement describing or explaining an event or condition made while the declarant was under the stress of excitement caused by the event or condition." "The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003) (internal quotations and citations omitted). Therefore, "[t]he pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate." *Id.*

[1] CJI2d 4.5(2) states: Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

The facts of the case indicate that the victim told her mother about defendant's inappropriate touching the same night the touching occurred. Moreover, the victim's mother described the victim as upset and crying at the time of the statement. And, a responding officer confirmed that the victim appeared to have been crying. The record supports that when the victim made the statement to her mother she was still under the pressure and stress of having been inappropriately touched and did not have the capacity to fabricate. As such, the evidence was properly admissible as substantive evidence of defendant's guilt pursuant to MRE 803(2). Accordingly, any objection by defense counsel to the trial court's jury instructions with regards to this statement would have been meritless, and trial counsel is not required to advocate a meritless position. *Snider*, 239 Mich App at 425. Counsel was not ineffective as to this statement.

We conclude, however, that the victim's statement to Detective Braate does not fall under any hearsay exception. Without an applicable hearsay exception, the victim's statement to Detective Braate should have only been considered as impeachment evidence. *Jenkins*, 450 Mich at 273. Defense counsel's failure to object to the instruction that allowed the jury to improperly consider impeachment evidence as substantive evidence of defendant's guilt fell below an objective standard of reasonableness; we find no applicable trial strategy that would warrant the failure to object. *Frazier*, 478 Mich at 243. This error by defense counsel, however, does not warrant relief, because defendant cannot show that but for defense counsel's error the outcome of trial would have differed. *Id*. The statement made to Detective Braate was cumulative with the evidence provided by the victim's mother and Blaine. Further, defendant mounted a strong defense to undermine the victim's prior statements, with both the victim and her mother testifying that the prior statements were lies perpetuated at the behest of Blaine. Therefore, with the jury able to consider the victim's similar statement to her mother as substantive evidence, it is unlikely that the jury would have come to a different decision had defense counsel's timely objection lead to a proper jury instruction. As such, defendant's claim of ineffective assistance of counsel fails. *Frazier*, 478 Mich at 243.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens